

*Straight Talk on Campaign Finance:
Separating Fact from Fiction*

Paper No. 5



MAGIC WORDS

- **When should a political television ad be deemed to be influencing the outcome of an election?** This question, more than any other, stands at the center of the campaign finance reform debate. Only by answering this question with precision can Congress enact legislation that achieves its stated policy goals and withstands constitutional challenge.
- **There are now empirical research findings to answer this central question.** The Brennan Center for Justice, in cooperation with Professor Kenneth Goldstein at the University of Wisconsin/Madison, has developed a national database of political television advertising in the 2000 election. The research duplicates a similar Brennan Center study of the 1998 mid-term elections. Together, these findings bring the debate over issue advocacy out of the realm of hunches and speculation.
- The current legal standard for identifying an electioneering ad is the so-called “magic words” test. According to a Supreme Court footnote in *Buckley v. Valeo*, a television commercial is deemed to be influencing the outcome of an election only if it includes words such as “vote for,” “vote against,” “elect,” or “defeat.”
- **Only 9 percent of the ads paid for by the congressional and presidential candidates in the 2000 election used the Supreme Court’s magic words.**
- **Only 4 percent of the ads paid for by congressional candidates in the 1998 election used magic words.**
- It would be difficult to create a test for electioneering ads that does a poorer job than the Supreme Court’s magic words test. Empirical evidence proves beyond any dispute that the Supreme Court standard is an abysmal failure.
- To evade the campaign finance regulations that attach to electioneering speech, special interest groups must run ads that refrain from using words of express advocacy.
- The restriction is toothless. More than 90 percent of candidates running for office in 1998 and 2000, each paying for TV ads with hard money and, therefore, free to tell viewers to “vote for” their candidacies, nevertheless chose not to use magic words. Thus, sham issue ads paid for by interest groups and political parties are indistinguishable from candidate ads.
- The decision by candidates to forego direct campaign appeals merely acknowledges the reality of effective television advertising – something the Supreme Court’s 25-year-old magic words test no longer can claim to do.



- Nike ads say “Just Do It”, not “buy these sneakers.” Coca Cola tells consumers “Coke Is It”, not “drink our soft drink.” Commercials from Pepsi and The Gap feature singing and dancing, but no dialogue or slogan at all. It should come as no surprise that political ads do not contain words that expressly advocate an action, since very little modern advertising does.
- In the 2000 presidential election, a Democratic Party ad titled, “Is That The Change You Want” concludes with, “Eight Nobel Prize winners in economics warn: George W. Bush’s plans exhaust the surplus and do not add up. Is that the economic change you want?” Nowhere does the ad say “vote against George W. Bush.” Yet no viewer could possibly miss that message. Since the ad foregoes magic words, the Democratic Party claimed this commercial was an issue ad and paid for it with unregulated soft money.
- There is no debate over whether genuine issue ads should be limited or banned. They should not. The question is whether the law successfully draws a precise line between issue advocacy, on the one hand, which is not subject to regulation, and campaign advocacy, on the other, which clearly and constitutionally is. The Supreme Court’s magic words fail this test.

The Brennan Center for Justice at NYU School of Law has conducted groundbreaking research studies of political television advertising in the 1998 and 2000 elections. Brennan Center attorneys testify frequently before Congress on the constitutionality of campaign finance bills, appearing this month before the House Judiciary Subcommittee on the Constitution and the Committee on House Administration.